STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of KWJ, Minor.

UNPUBLISHED
December 12, 2013

No. 317091
Allegan Circuit Court
Family Division
LC No. 12-050984-AY

Before: SAWYER, P.J., and MARKEY and STEPHENS, JJ.

PER CURIAM.

Respondent father appeals by right the order terminating his parental rights to the minor child under MCL 710.51(6) (failure, having the ability, to provide support and to visit, contact, or communicate with the child for two years or more) after petitioners, mother and stepfather, filed for stepparent adoption. We affirm.

Petitioner mother and respondent never married and their relationship produced one child, born in April 2002. Respondent was convicted of assault with intent to commit murder after a February 2002 incident, and has been incarcerated since that time. His earliest release is February 2017. Petitioner mother brought the child to visit respondent in prison several times but ceased doing so in 2005 or 2006. Thereafter, petitioner mother opined that it would be best not to expose the child to the prison "environment." Respondent acquiesced to this decision. Petitioner mother and stepfather married in 2007, and, in November 2012, they petitioned for stepparent adoption and termination of respondent's parental rights.

Respondent argues that the trial court erred in finding that petitioners satisfied the conditions of MCL 710.51(6) by clear and convincing evidence. "A petitioner in an adoption proceeding must prove by clear and convincing evidence that termination of parental rights is warranted." *In re Hill*, 221 Mich App 683, 691; 562 NW2d 254 (1997). We review the trial court's findings for clear error. *Id.* at 691-692. "A finding is clearly erroneous if, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made." *Id.* at 692.

> If the parents of a child are divorced, or if the parents are unmarried but the father has acknowledged paternity . . . and if the parent having legal custody of the child subsequently marries and that parent's spouse petitions to adopt the child, the court upon notice and hearing may issue an order terminating the rights of the other parent if both of the following occur:

> (a) The other parent, having the ability to support, or assist in supporting, the child, has failed or neglected to provide regular and substantial support for the child or if a support order has been entered, has failed to substantially comply with the order, for a period of 2 years or more before the filing of the petition.
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> (b) The other parent, having the ability to visit, contact, or communicate with the child, has regularly and substantially failed or neglected to do so for a period of 2 years or more before the filing of the petition. [MCL 710.51(6).]

The applicable two-year period under MCL 710.51(6) begins on the date that the termination petition is filed and extends backward for two years or more. *In re Hill*, 221 Mich App at 689. Because the statutory period is two years or more, "circumstances beyond the applicable two-year statutory period may be considered." *Id.* at 692-693. The applicable period in this case is November 2010 until November 2012. Respondent testified that he last saw the child sometime in 2006 and, thereafter, only spoke with the child once on the telephone around Easter 2010. Respondent never provided monetary support for the child. The evidence clearly indicates that respondent did not support the child nor did he have any contact with the child during the statutory period. Respondent argues, however, that he did not have the *ability* to support the child or to communicate because petitioner mother frustrated his efforts. We disagree.

With regard to support, respondent made about $50 to $150 per month working at the prison from November 2010 until November 2012. Although he did not have petitioners' most recent address, he had the maternal grandparents' address and was able to send support through his own mother. Nevertheless, respondent testified that he never attempted to send support and never inquired about any method to do so. Thus, the trial court did not clearly err finding that respondent had the ability, "maybe not for full care and custody, but a proportion of money would certainly be available to provide some support." With regard to MCL 710.51(6)(b), although the record indicates that petitioner mother did not actively facilitate communication between respondent and the child, she gave respondent her telephone number and provided her updated address when asked. Respondent sent only a few letters to the maternal grandparents' address, each addressed to petitioner mother, not the child, from November 2010 until November 2012. Respondent's own mother testified that he had not given her anything to pass along to the minor child since the child was six years of age. Respondent testified that he attempted to reach the child via telephone, but provided no evidence to support his testimony. This record establishes that respondent failed to make reasonable efforts to "visit, contact, or communicate with the child," even through surrogates, for the statutory two-year period. See *In re Caldwell*, 228 Mich App 116, 121-122; 576 NW2d 724 (1998). Accordingly, the trial court did not clearly err in finding that MCL 710.51(6)(a) and (b) were established by clear and convincing evidence.

Next, respondent argues that the trial court clearly erred in finding that termination was in the child's best interest. We disagree. Respondent had been in prison since the child's birth and would not be released until at least 2017. Respondent did not have substantial or regular contact with the child and did not provide for the child's financial or emotional needs. Thus, they clearly did not share a bond. More importantly, the child deserved permanency and needed a father on a "day-to-day basis." Thus, the trial court did not clearly err in finding termination was in the child's best interest. See *In re Caldwell*, 228 Mich App at 124.

On appeal, respondent argues that the trial court should have heard testimony from the child or appointed a guardian ad litem before making its best interest determination. However, respondent does not cite to case law or expound upon this argument; thus, this issue is abandoned. *In re Costs & Attorney Fees*, 250 Mich App 89, 104; 645 NW2d 697 (2002). Moreover, the trial court had sufficient evidence to make a best interest determination; therefore, this issue is without merit.

Finally, respondent argues that the trial court erred by finding that termination was in the child's best interest by a "preponderance" of the evidence because the correct standard is "clear and convincing" evidence. Respondent did not raise a challenge to the evidentiary standard used by the trial court. "Our review is therefore limited to plain error affecting substantial rights." *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008). This Court has held that in a parental rights termination proceeding under MCL 712A.19b(3), the preponderance of the evidence standard applies to the best-interest determination required by MCL 712A.19b(5). *In re Moss*, 301 Mich App 76, 83, 90; 836 NW2d 182 (2013). Although this case arises under the Adoption Code, the same considerations apply because both statutes provide for the termination of parental rights. Therefore, the preponderance of evidence standard applies to the trial court's best interest determination and plain error did not affect respondent's substantial rights.

We affirm.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Cynthia Diane Stephens